STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 6, 2006
v	No. 259466 St. Clair Circuit Court
STEPHEN WAYNE SEARS, Defendant-Appellant.	LC No. 03-002668-FH

Before: Smolenski, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor or with an unlawful blood alcohol level, third offense, MCL 257.625(1) and (8). He was sentenced as a third habitual offender, MCL 769.11, to two years' probation, with 270 days to be served in jail. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the evidence was insufficient to establish that he operated the motor vehicle. In determining whether evidence is sufficient to sustain a conviction, we view all the evidence, direct and circumstantial, as well as all reasonable inferences that may be drawn therefrom, in a light most favorable to the prosecution. *People v Hardiman*, 466 Mich 417, 428-429; 646 NW2d 158 (2002); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992).

Under *People v Wood*, 450 Mich 399, 404; 538 NW2d 351 (1995), "operating," for purposes of MCL 257.625(1), is defined in terms of the danger that it seeks to prevent, namely, the collision of a vehicle with other persons or property. "Once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk." *Id.* at 404-405. But unlike *Wood*, this case does not present any issue concerning the lawfulness of defendant's arrest. Further, this case is factually distinguishable from *People v Burton*, 252 Mich App 130, 143; 651 NW2d 143 (2002), in which there was evidence that the defendant used his truck only as a shelter and posed no significant risk of collision. The facts of this case are more analogous to *People v Stephen*, 262 Mich App 213; 685 NW2d 309 (2004), in which this Court found sufficient evidence to support a charge of operating a motor vehicle while under the influence of intoxicating liquor where the defendant admitted driving to a fairground to sleep off the effects of having too much to drink and "struck the

parking log while attempting to leave the fairgrounds, and turned off the engine and went to sleep after he was unable to dislodge his truck." *Id.* at 219-220.

Although defendant here did not admit to driving the vehicle, a police officer testified that the vehicle was over a curb-type cement barrier and against a building, that the engine was running, that the vehicle's gear was in the drive position, and that defendant was asleep in the driver's seat. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to infer beyond a reasonable doubt that defendant actually caused a collision by driving his vehicle. Thus, there was sufficient evidence that defendant was operating the vehicle within the meaning of MCL 257.625(1).

Defendant also argues that he should be granted a new trial based on newly discovered evidence. A motion for a new trial based on newly discovered evidence must first be presented to the trial court under the applicable court rule. *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998). Because defendant did not raise this issue in a motion for a new trial before the trial court, our review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). A plain error is a clear or obvious error. *Id.*.

In order to warrant a new trial based on newly discovered evidence, a defendant must show that (1) the evidence itself, and not its materiality, was newly discovered, (2) the evidence was not cumulative, (3) the evidence could not have been discovered and produced at trial, using reasonable diligence, and (4) the new evidence makes a different result probable on retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). A new trial is not warranted where the new evidence would be used merely for impeachment purposes, *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993), or relates only to a witness's credibility, *People v McWhorter*, 150 Mich App 826, 834; 389 NW2d 499 (1986).

Defendant contends that a witness, who was known to him at the time of the trial, will corroborate defendant's own testimony that he did not operate the vehicle. Because the witness was both known to defendant and would merely offer cumulative testimony, we cannot conclude that a new trial is warranted on the basis of this evidence.

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald S. Owens
/s/ Pat M. Donofrio